

Genetic Information Nondiscrimination Act – What Employers Need To Know

In November 2009, the Genetic Information Nondiscrimination Act (GINA), which prohibits genetic discrimination, went into effect. GINA applies to all employers with 15 or more employees. Under GINA, it is illegal for health insurers and employers to discriminate based on an individual's "genetic information". In November 2010, the Equal Employment Opportunity Commission (EEOC) adopted regulations for GINA. This article discusses the law and what employers need to consider to protect themselves against a charge of discrimination.

What the law provides. The employment-related provisions of GINA provide that an employer may not discriminate against employees or applicants because of genetic information with respect to hiring, firing, compensation, and terms of employment. Employers also cannot limit, segregate, or classify workers because of genetic information in any way that would deprive them of employment opportunities.

In addition to the prohibition against discrimination, it is also against the law to harass an employee because of his/her genetic information or to retaliate against a person because the person complained about genetic discrimination, filed a charge of discrimination, or participated in an employment discrimination inquiry, investigation or lawsuit related to genetic discrimination.

Further, employers may not request, require or purchase genetic information about an employee or an employee's family member; or use such information to satisfy certification requirements of the Family and Medical Leave Act or monitor the biological effects of toxic substances in the workplace, unless such acquisition is required by state or federal law or the employee gives prior knowing, voluntary and written authorization.

GINA also requires employers that have any genetic information about workers to keep that information in separate files and to treat it as a confidential medical record. Employers are also prohibited from disclosing a worker's genetic information except in very limited circumstances.

What is "genetic information"? Genetic information includes not only information about an employee's genetic test and the genetic tests of an employee's family members, but also information about any diseases, disorders, or conditions that an employee's family member has. GINA defines a family member as the: (1) spouse of the individual; (2) a dependent child of the individual, including a child who is born to or placed for adoption with the individual; or (3) parent, grandparent, or great-grandparent.

Genetic information does not include information about the sex or age of an employee or the employee's family members, or information that an employee currently has a disease or disorder. Genetic information also does not include tests for alcohol or drug use.

Implementing a GINA policy. GINA does not require that employers provide a written GINA policy to their employees. Some employers may choose to include "genetic information" in the list of protected classifications in their Equal Employment Opportunity and Nondiscrimination policies. Others may choose to implement a standalone GINA policy.

Wellness Programs and GINA. GINA may also have an impact on an employer’s wellness program. Some wellness programs require an employee to complete a Health Risk Assessment (HRA) in order to be eligible for reduced healthcare premiums or deductibles, a monetary reward, or other incentive. Employers who implement an employee wellness program should ensure that the program is GINA compliant.

Requests for Medical Information. There are a number of circumstances under which an employer may lawfully require an employee to submit medical information, such as certification for a medical leave of absence. In the event an employer requests medical information from an employee (or his/her health care provider) and the employer receives genetic information in addition to the requested medical information, the employer may be liable under GINA. However, GINA’s regulations provide a safe harbor for employers that inadvertently receive otherwise protected genetic information. Specifically, receipt of genetic information from an employee (or his/her health care provider) may be considered “inadvertent,” and thus, not a violation of GINA, if the employer instructs employees and/or health care providers from whom medical information is sought that the employer is not seeking and should not be provided with genetic information.

To limit liability under GINA, employers should add safe harbor language to their medical-related forms. For example, revisions to forms related to the Family and Medical Leave Act, medical examinations, disability and reasonable accommodation requests, and other medical leaves of absence should be considered.

Employment Posters. The EEOC has revised its “Equal Employment Opportunity is the Law” poster to add information about GINA and updates from the Department of Labor regarding disabilities and retaliation. As a result, employers must update their posters.

This can be done by either posting a supplement alongside the current EEO poster (September 2002 “EEO is the Law”) or by posting the EEOC’s November 2009 version of the “EEO is the Law” poster. These posters may be downloaded or ordered from the EEOC website at: <http://www1.eeoc.gov/employers/poster.cfm>.

Best Practices. To comply with the provisions of GINA, an employer should consider the following best practices:

- Ensure that all employment posters are up to date.
- Revise EEO and nondiscrimination policies to include “genetic information” as a protected classification or implement a GINA policy.
- Review wellness programs, including those managed by third parties, to ensure compliance with GINA.
- Include safe harbor language with all requests for medical information.

- Train supervisors and HR staff about the provisions of GINA and their responsibilities for compliance.
- Provide and distribute a procedure for lodging and investigating complaints alleging violation of GINA protections.

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